

IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF OKLAHOMA

TIMOTHY A. WILSON,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. CIV-09-942-C
	)	
GREG WILLIAMS, Warden; JAMES	)	
WALLS, Correctional Officer; and	)	
T. McCOLLUM, Deputy Warden,	)	
	)	
Defendants.	)	

ORDER ADOPTING REPORT AND RECOMMENDATION

Plaintiff brought the present action pursuant to 42 U.S.C. § 1983, seeking recompense for alleged violations of his constitutional rights. Consistent with the provisions of 28 U.S.C. § 636(b)(1)(B), this action was referred to United States Magistrate Judge Valerie Couch. Judge Couch entered a Report and Recommendation (“R&R”) on September 24, 2010, to which Plaintiff timely objected.

The substantive facts and law are accurately set out in the Magistrate Judge’s Report and Recommendation and there is no purpose to be served in repeating them yet again. As Judge Couch noted, Plaintiff failed to exhaust administrative remedies prior to filing the present action and therefore dismissal is required. Plaintiff’s objection does not dispute the lack of exhaustion, but argues exhaustion should be excused because it would be futile. The Tenth Circuit has held that futility does not excuse exhaustion under the Prison Litigation Reform Act. See Jernigan v. Stuchell, 304 F.3d 1030, 1032 (10th Cir. 2002).

The Court declines to adopt that portion of the R&R which recommends conversion of the Motion to Dismiss to a Motion for Summary Judgment. The Tenth Circuit has made clear

that dismissal for lack of exhaustion should be without prejudice. See Fitzgerald v. Corr. Corp. of America, 403 F.3d 1134, 1139 (10th Cir. 2005).<sup>\*</sup> Thus, the Court finds that Defendants' motion should have been construed as brought pursuant to Fed. R. Civ. P. 12(b)(1). Under that Rule, the material appended to the motion could be considered without need to convert to a Rule 56 motion. Davis ex rel. Davis v. United States, 343 F.3d 1282, 1296 (10th Cir. 2003). For the reasons made clear by Judge Couch, the Court will dismiss the matter without prejudice.

As set forth more fully herein, the Court adopts, in part, the Report and Recommendation of the Magistrate Judge (Dkt. No. 58), and for the reasons announced therein, DISMISSES Plaintiff's Complaint without prejudice. A judgment will enter accordingly. Plaintiff's Motion for Order for Expungement of Misconduct (Dkt. No. 53), Motion for Appointment of Counsel (Dkt. No. 42), and Motion for Appointment of Counsel (Dkt. No. 57) are DENIED as moot.

IT IS SO ORDERED this 9th day of November, 2010.

  
ROBIN J. CAUTHRON  
United States District Judge

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<sup>\*</sup> The Court notes that in several unpublished opinions, the Circuit has approved the entry of summary judgment when considering a failure to exhaust. See Hines v. Sherron, 372 Fed. Appx. 853 (10th Cir. 2010); Williams v. Sirmon, 350 Fed. Appx. 294 (10th Cir. 2010); and Washington v. Corrections Corp. of America, 197 Fed. Appx. 798 (10th Cir. 2006). Nevertheless, given the clear precedential instruction that exhaustion is a jurisdictional matter which should be resolved through dismissal without prejudice, the Court declines to adopt this portion of the R&R.